

E-FILED - 8/18/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

L.C. HARMON,) No. C 07-1576 RMW (PR)
Petitioner,)
vs.) ORDER GRANTING
BEN CURRY, Warden,) RESPONDENT'S MOTION TO
Respondent.) DISMISS; DENYING
Petitioner's Request for Judicial Notice;
Directing Petitioner to File Amended Petition or
Request for Stay
(Docket Nos. 8, 9)

Petitioner, a California state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the Board of Prison Terms' ("Board") decision denying him parole. The court ordered respondent to show cause why the petition should not be granted. Respondent filed a motion to dismiss the petition for petitioner's failure to exhaust state remedies. Petitioner filed an opposition. Respondent filed a reply. Having reviewed the papers, the court GRANTS respondent's motion to dismiss. Petitioner has also filed a request for judicial notice which the court DENIES as unnecessary.

BACKGROUND

Petitioner was sentenced to fifteen years-to-life in state prison after his guilty plea to second degree murder in Los Angeles Superior Court. Petitioner challenges the Board's decision

1 denying him parole. Petitioner filed a state habeas petition in the superior court and court of
 2 appeal, and a petition for review in the state supreme court. All were denied. The instant
 3 petition was filed on March 20, 2007.

4 In the petition, petitioner raises the following claims, which this court found cognizable
 5 in its order to show cause: (1) the Board's denial of parole violated his plea agreement; and
 6 (2) the Board violated his right to equal protection under the California Constitution and the
 7 Fourteenth Amendment when it failed to consider setting his parole term and failed to fix a
 8 primary term.

9 DISCUSSION

10 A. Motion to Dismiss

11 Respondent moves to dismiss the petition on the ground it is unexhausted because
 12 petitioner did not fairly present his "equal protection" claim for review to the state courts.
 13 Petitioner maintains that the claim was exhausted because he presented it to the state's highest
 14 court.

15 Prisoners in state custody who wish to challenge collaterally in federal habeas
 16 proceedings either the fact or length of their confinement are first required to exhaust state
 17 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
 18 highest state court available with a fair opportunity to rule on the merits of each and every claim
 19 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). The exhaustion-of-state-
 20 remedies doctrine reflects a policy of federal-state comity to give the state "the initial
 21 'opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" Picard
 22 v. Connor, 404 U.S. 270, 275 (1971) (citations omitted). The exhaustion requirement is satisfied
 23 only if the federal claim has been "fairly presented" to the state courts. See id.; Peterson v.
 24 Lampert, 319 F.3d 1153, 1155-56 (9th Cir. 2003) (en banc). A federal district court must
 25 dismiss a federal habeas petition containing any claim as to which state remedies have not been
 26 exhausted. See Rhines v. Webber, 544 U.S. 269, 273 (2005).

27 There is no dispute that petitioner presented both of his federal claims to the California
 28

1 Supreme Court in his December 18, 2006, petition for review. See Respondent's Motion to
 2 Dismiss, Exhibit 1. Respondent argues, however, that the petition for review did not fairly
 3 present the equal protection claim to the California Supreme Court because petitioner did not
 4 raise that claim in the habeas petition he filed in the appellate court. See Respondent's Motion
 5 to Dismiss, Exhibit 2. Petitioner concedes that he raised the claim only in his petition for review,
 6 but argues this constituted fair presentation.

7 As a general rule, a petitioner satisfies the exhaustion requirement by fairly presenting
 8 the federal claim to the appropriate state courts in the manner required by the state courts,
 9 thereby affording the state courts a meaningful opportunity to consider allegations of legal error.
 10 Casey v. Moore, 386 F.3d 896, 915-16 (9th Cir. 2004). In Castille v. Peoples, 489 U.S. 346, 351
 11 (1989), the United States Supreme Court held that a claim was not fairly presented where it was
 12 raised for the first time on discretionary review to the state's highest court and denied without
 13 comment. In so holding, the Supreme Court stated, “[W]here the [federal] claim has been
 14 presented for the first and only time in a procedural context in which its merits will not be
 15 considered unless there are special and important reasons . . . [r]aising the claim in such a
 16 fashion does not . . . constitute fair presentation.” Id. The Ninth Circuit has interpreted Castille
 17 to stand for the proposition that a petitioner does not fairly present a federal claim to the state
 18 courts if he seeks review of the claim for the first time on discretionary appeal. See Casey, 386
 19 F.3d at 917-18.

20 A review of petitioner's state habeas petitions in California Superior Court, see
 21 Petitioner's section 2254 petition, Exhibit A, and in California Court of Appeal, see Petitioner's
 22 section 2254 petition, Exhibit B, reveals no equal protection claim similar to that raised in his
 23 petition for review to the California Supreme Court, see Respondent's Motion to Dismiss,
 24 Exhibit 1. The language of Rule 8.500(c)(1) of the California Rules of Court makes clear that a
 25 petition for review to the California Supreme Court is a discretionary appeal. “As a policy
 26 matter, on petition for review the Supreme Court normally will not consider an issue that the
 27 petitioner failed to timely raise in the Court of Appeal.” Cal. Rules of Court, Rule 8.500(c)(1).
 28

1 Here, petitioner raised his equal protection claim only in his petition for review to the California
 2 Supreme Court, and that court denied the petition without comment. Accordingly, under Casey,
 3 this court finds that petitioner did not fairly present his equal protection claim for review to the
 4 state courts.

5 Having concluded that petitioner did not exhaust his equal protection claim, the court will
 6 GRANT respondent's motion to dismiss the petition as a "mixed" petition that contains both an
 7 exhausted and unexhausted claim. See Rhines, 544 U.S. at 273. Before entering a judgment of
 8 dismissal, however, the court must provide petitioner an opportunity to amend the mixed petition
 9 by striking his unexhausted claim as an alternative to suffering dismissal. Jefferson v. Budge,
 10 419 F.3d 1013, 1016 (9th Cir. 2005) (citing Rhines, 544 U.S. at 277). As a further alternative,
 11 the court may stay the mixed petition while petitioner returns to state court to exhaust his
 12 unexhausted claim. See Rhines, 544 U.S. at 277. Accordingly, petitioner may choose either to
 13 amend his petition and proceed only with his exhausted claim, or request a stay of the petition
 14 while he exhausts his unexhausted claim in state court. A stay will not be granted, however,
 15 unless petitioner can show there was good cause for his failure to exhaust his equal protection
 16 claim in state court.¹ See id. The court will address the merits of the claim following
 17 petitioner's election below, and resolution of the exhaustion issue.

18 B. Motion for Judicial Notice

19 Petitioner filed a motion for judicial notice and attached exhibits to his motion. The court
 20 will review the attached exhibits and consider all relevant portions along with the merits of the
 21 petition after the briefing is complete. Accordingly, petitioner's motion for judicial notice
 22 (docket no. 8) is DENIED as unnecessary.

23 **CONCLUSION**

24 For the reasons stated above, the Court hereby orders as follows:

25 1. Respondent's motion to dismiss (docket no. 9) is GRANTED.

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 28 ¹ The court has already found potential for merit in the claim in its September 10, 2007,
 order to show cause.

1 2. Petitioner's motion for judicial notice (docket no. 8) is DENIED as unnecessary.

2 3. No later than **thirty (30) days** from the date of this order, petitioner shall either:

3 (1) file an amended petition that includes only his exhausted claim and strikes the unexhausted
4 claim, or (2) file a request for a stay of this matter while he exhausts his unexhausted claim in
5 state court.

6 3. If petitioner chooses to file an amended petition, he must include the caption and civil
7 case number used in this order, No. C-07-1576 RMW (PR), as well as the words FIRST
8 AMENDED PETITION on the first page; petitioner shall not incorporate material from the
9 original petition by reference.

10 4. If petitioner fails to file either an amended petition or a request for a stay as ordered
11 herein, the petition will be dismissed without prejudice to petitioner's later filing a new petition
12 that contains only exhausted claims.

13 This order terminates Docket Nos. 8 and 9.

14 IT IS SO ORDERED.

15 DATED: 8/15/08


RONALD M. WHYTE
United States District Judge